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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GEORGINA TORRES, Defendant and Appellant.	B290260 (Los Angeles County Super. Ct. No. BA223343)

APPEAL from an order of the Superior Court of Los Angeles County. Michael Luros, Judge. Affirmed.

Caneel C. Fraser, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Georgina Torres appeals the denial of her motion to vacate a conviction under Penal Code section 1473.7.[1] She contends her trial counsel failed properly to advise her of the adverse immigration consequences of her plea agreement, and the erroneous advisement damaged her ability to meaningfully understand and accept or defend against those consequences. We affirm the denial of her motion.

BACKGROUND

In 2001, Torres pleaded no contest to possession for sale of a controlled substance. (Health & Saf. Code, § 11378.) At the time of her plea Torres acknowledged she had had a chance fully to discuss the case with her attorney, and she was given the following advisement: "If you're not a citizen of the United States, your conviction will result in deportation, denial of naturalization, denial of amnesty or denial of reentry into this country." When asked, "Do you understand this?" Torres responded, "Yes." The trial court sentenced Torres to time served (15 actual days) and placed her on three years of formal probation.

In 2004, the trial court set aside and dismissed the conviction pursuant to section 1203.4 (dismissal of charges after termination of probation).

In 2015, Torres arrived at Los Angeles International Airport seeking readmission to the United States as a returning lawful permanent resident. She thereafter became subject to removal proceedings under section 240 of the Immigration and Naturalization Act.

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[1] Undesignated statutory references will be to the Penal Code.

In 2018, Torres moved to vacate her conviction of the original charge pursuant to section 1473.7.

In support of the motion Torres declared she was brought to the United States from Mexico in 1976 as an infant, and became a lawful permanent resident in 1989. At the time of her plea in 2001 she had a job and two young children, both born in the United States, and had "immediate family in this country and only a few relatives" in Mexico. Torres declared, "I was represented by an attorney, Alex Kessel. . . . He said that it was OK to plead to the charge, because I could expunge the plea later and avoid immigration consequences."

Torres further supported her motion with a copy of an email sent by Kessel in 2017, in which he stated, "I do not remember [Torres] specifically. However, it is my custom, practice and habit to ascertain the immigration status of my client and discuss with my client all possible immigration consequences before any guilty plea is entered."

The People opposed Torres's motion, offering Kessel's declaration. In it he stated:

"At the present time, I do not have a clear memory of the specific factual details of the charged crimes. [¶] . . . [¶] I have been practicing criminal defense for approximately 30 years. [¶] It was my custom and habit in 2001, as it is currently, to always discuss the potential immigration consequences attendant to a no contest plea by a non-citizen in a criminal case. [¶] I have always advised a defendant pleading no contest/guilty to a narcotic trafficking charge, like a violation of Health and Safety Code Section 11378, could have immigration consequences including deportation proceedings. [¶] I also know that an expungement of a felony no contest/guilty plea will not be

honored by immigration officials. [¶] . . . [¶] I never told defendant Torres that 'it was ok to plead to the charge, because [she] could expunge the plea later and avoid immigration consequences.' [¶] I would have discussed the expungement process totally separate and apart from my discussions with the client about potential immigration consequences. [¶] I would never [imply] to a client that an expungement would alleviate the potential immigration consequences flowing from a felony narcotic conviction."

At the hearing the trial court stated it had considered Torres's and Kessel's declarations and found that Torres lacked credibility. It therefore denied her motion.

DISCUSSION

Under the Immigration and Naturalization Act, a resident alien convicted of a crime involving a controlled substance may be denied readmission to the United States. (8 U.S.C. §§ 1229b(a), 1182(a)(2)(A)(i)(II).)

Section 1203.4 authorizes a defendant who successfully completes probation to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty, after which the charges shall be dismissed and the defendant released from state-law penalties and disabilities resulting from the conviction. (§ 1203.4, subd. (a).) But this action has no effect on the federal immigration consequences of the conviction. (*People v. Martinez* (2013) 57 Cal.4th 555, 560.)

On the other hand, a conviction vacated because of procedural or substantive infirmities is no longer valid for immigration purposes. (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1005 (*Camacho*); *Pickering v. Gonzales* (6th Cir. 2006) 465 F.3d 263, 270.)

Section 1473.7 authorizes a person no longer in criminal custody to move to vacate a conviction that "is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subd. (a)(1).) "The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a)." (§ 1473.7, subd. (e)(1).)

The moving party must show "prejudicial error," i.e., that he or she would have rejected the plea if aware of its immigration consequences. (*Camacho*, *supra*, 32 Cal.App.5th at pp. 1010-1012.) "In some cases, a defendant 'would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a "Hail Mary" at trial.' " (*People v. Chen* (June 28, 2019, A152754) ___ Cal.App.5th ___ [p. 3] [2019 WL 2749957].)

When an order denying a motion to vacate a conviction is challenged on statutory grounds, our review is for abuse of discretion. (See *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.) "An abuse of discretion is found if the court exercises discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice." (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.) When an appellant claims he was deprived of a constitutional right, i.e., the right to effective assistance of counsel, our review is de novo. (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76.)

Torres contends Kessel did not adequately advise her of the immigration consequences of her plea because he failed to advise

her it was certain the underlying plea would cause her mandatory deportation.

An attorney representing a client on a charge leading to mandatory deportation "must inform [his or] her client whether his [or her] plea carries a risk of deportation." (*Padilla v. Kentucky* (2010) 559 U.S. 356 [130 S.Ct. 1473, 176 L.Ed.2d 284] (*Padilla*).)

Here, Kessel declared that in 2001 his invariable practice was to discuss with clients the potential immigration consequences attendant to a no contest plea by a noncitizen in a criminal case. He knew that an expungement of a felony no contest plea would not be honored by immigration officials, and specifically denied telling Torres that expungement would avoid the immigration consequences of a felony narcotics conviction.

This explanation combined with the advisement that as a noncitizen she would be subject to deportation imparted to Torres the risk of deportation as required under *Padilla* and provided her the ability to meaningfully understand the consequences of her plea. (*People v. Chen*, *supra*, ___ Cal.App.5th ___ [p. 4] [2019 WL 2749957] [defense counsel's informing defendant that her plea would have the potential to cause her removal from the United States and inability to return "clearly impart[ed] a risk of deportation . . . and provided Chen notice and the ability to more fully explore, if she wished, the immigration consequences of her plea"].)

Kessel's declaration was clear and logical, and the trial court was entitled to believe him and to disbelieve Torres's contrary claims.

Torres argues the only proper advisement would have been that deportation was certain because her offense qualified for

mandatory deportation under federal law. We disagree. Even in cases where an offense qualifies for mandatory deportation under federal law, the fact of deportation is not certain. (*People v. Chen*, *supra*, ___ Cal.App.5th ___ [p. 4] [2019 WL 2749957] ["we are unwilling to require counsel to state deportation will be certain because it may not be accurate advice, even in cases where an offense qualifies for mandatory deportation under federal law"].)

Moreover, even if the trial court had concluded that Kessel erred, Torres could not prevail because she cannot establish prejudice. A moving party shows prejudice by establishing she would not have entered the plea had she known it would render her deportable. (*Camacho*, *supra*, 32 Cal.App.5th at pp. 1011-1012.) "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how [she] would have pleaded but for [her] attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee v. United States* (2017) 532 U.S. ____ [137 S.Ct. 1958, 1967, 198 L.Ed.2d 476] (*Lee*); see *People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 223-224 ["An allegation that trial counsel failed to properly advise a defendant is meaningless unless there is objective corroborating evidence supporting appellant's claimed failures. . . . [Citation], the 'easy' claim that counsel gave inaccurate information further requires corroboration and objective evidence because a declaration by defendant is suspect by itself"].) In short, "uncorroborated self-serving statements are insufficient to meet [the] burden of proof." (*People v. Chen*, *supra*, ___ Cal.App.5th ___ [p. 6] [2019 WL 2749957].)

In 2001, Health and Safety Code section 11378 provided that a person who possesses for sale a controlled substance would be punished by a term "in state prison." (Former Health & Saf. Code, § 11378.) Torres's plea resulted in her being sentenced to time served and placed on three years of formal probation. Her plea agreement offered a better resolution than she would have received had she been convicted after a trial.

Torres offers no corroboration for her claim that she nevertheless would have rejected the plea and proceeded to trial had Kessel been more explicit about its immigration consequences. For example she adduces nothing about the likelihood of her success at trial. (See *Lee*, *supra*, 582 U.S. at p. ___ [137 S.Ct. at p. 1966] ["defendants obviously weigh their prospects at trial in deciding whether to accept a plea. [Citation.] Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one"].)

Torres argues that the calamitous nature of the immigration consequences—separation from her children and her job and removal to a country of which she knows little—corroborates her declaration that had she known of the consequences she would have thrown the "Hail Mary" at trial to avoid them, as deportation after some time in prison would not differ meaningfully from deportation after somewhat less time. We disagree. When a person contends she would have acted to avoid a consequence, the consequence itself may add credibility to the declaration but it offers no independent corroboration. Torres's assertions that she would not have accepted the plea had she been properly advised, without more, are legally insufficient to demonstrate prejudice.

In any event Torres's aversion to deportation adds nothing. She presumably did not want to go to prison either, yet she possessed a controlled substance with intent to sell it. Aversion to a consequence governs an individual's actions only in relation to how likely she perceives the consequence to be. Even if Torres was averse to deportation, the trial court could reasonably conclude she would lay odds against uncertain future immigration enforcement in favor of avoiding prison in the near term, and thus knowingly enter her plea.

And there was no evidence that an alternative plea devoid of immigration consequences would have been available to Chen. Indeed, Kessel declared that "many times the prosecution will not offer a simple possession charge in a case involving credible evidence of possession with the intent to sell or distribute." Nor did Torres proffer any evidence that she would have had a viable defense to the drug sales charge to which she pleaded. Given these realities, Torres has not demonstrated prejudice from accepting a plea that offered her a better resolution than would have been likely after trial. (*People v. Chen*, *supra*, ___ Cal.App.5th ___ [p. 5] [2019 WL 2749957].)

DISPOSITION

The order denying Torres's motion to vacate her conviction is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

BENDIX, J.

WEINGART, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.